Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

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Offense Conduct

DRUG QUANTITY—MANDATORY MINIMUMS

Second Circuit vacates mandatory minimum sentence that was based on inclusion of relevant conduct that was not part of the offense of conviction. Defendant was arrested in November 1991 and charged with possession of a firearm in connection with a drug trafficking offense and possession of cocaine with intent to sell. In February 1992, defendant was arrested again and charged with conspiracy to possess with intent to distribute and conspiracy to distribute cocaine. Pursuant to a plea agreement, he was convicted of the November weapons charge and the February charges; the November drug charge was dropped. In sentencing defendant on the February drug charges, which involved .431 grams of cocaine base, the district court included the 12.86 grams of cocaine base involved in the November transaction and sentenced defendant to the mandatory minimum five-year sentence for a conspiracy involving more than five grams of cocaine base, 21 U.S.C. §§ 841(b)(1) and 846.

The appellate court remanded, holding that the November drug amount could be included as relevant conduct in computing the guideline sentence, if appropriate, but could not be counted toward the mandatory minimum. "Unlike the Guidelines, which require a sentencing court to consider similar conduct in setting a sentence, the statutory mandatory minimum sentences of 21 U.S.C. § 841(b)(1) apply only to the conduct which actually resulted in a conviction under that statute. Thus, the district court erred in concluding that it should include the cocaine from the November episode not only as related conduct relevant to the base offense level for the February episode, but also in determining whether the mandatory minimum for the February offense applied. . . . [Section 841(b)(1)] indicates that the minimum applies to the quantity involved in the charged, and proven, violation of § 841(a). In this case, Darmand's violation of § 841(a) was found to involve only .431 grams. Consequently, the mandatory minimum should not have been imposed."

U.S. v. Darmand, No. 93-1009 (2d Cir. Sept. 8, 1993) (Oakes, J.).

See *Outline* at II.A.3.

DRUG QUANTITY—RELEVANT CONDUCT

U.S. v. Adams, 1 F.3d 1566 (11th Cir. 1993) (Remanded: In determining what drug amounts were reasonably foreseeable to conspiracy defendant who had participated in only one abortive flight to pick up marijuana, it was error to attribute to him "a hypothetical second load that [he] never attempted to transport." While it may sometimes be appropriate to hold a defendant liable for other flights, "[a] sentencing court may not speculate on the extent of a defendant's involvement in a conspiracy; instead, such a finding must be supported by a preponderance of the evidence . . . . There was no evidence that Adams intended to be involved with another flight or that it was foreseeable to him that there would be another flight."). See *Outline* at II.A.1.

Criminal History

CONSOLIDATED OR RELATED CASES

Seventh Circuit holds that there must have been a formal consolidation order or other judicial determination for prior convictions to be "consolidated for sentencing." The district court sentenced defendant as a career offender after finding that two of defendant's prior convictions for bank robbery—which had been charged in the same indictment—were related, but that a third, separately indicted robbery was not. Defendant argued that the convictions had been "consolidated for sentencing," § 4A1.2, comment. (n.3). "Both indictments were returned by the same grand jury at the same time. The cases, which had separate docket numbers, were assigned to the same judge and identical bonds were set. The charges proceeded together through arraignment, motions, motion hearing, plea agreement, plea hearing, sentence hearing, and subsequent sentence modification. All three offenses . . . were the subject of Russell's plea agreement. Russell received 15-year concurrent sentences for each of the three offenses, in separate orders, but one order referring to the separate cases by number modified the sentences to ten years on each count." The district judge determined that the separate offenses, indictments, minute sheets, judgments, and convictions "do not suggest consolidation." Also, there was no formal consolidation order, and the two robberies in the first indictment were committed by defendant alone while the third was by defendant and his brother.

The appellate court affirmed, noting initially that Application Note 3 is binding and thus consolidated sentences must be treated as related, but that "the commentary does not answer the question of when sentences should be deemed to have been 'consolidated' for sentencing." The court concluded that "the purpose of the guideline would best be implemented by requiring either a formal order of consolidation or a record that shows the sentencing court considered the cases sufficiently related for consolidation and effec-tively entered one sentence for the multiple convictions. . . . In other words, there must be a judicial determination by the sentencing judge that the cases are to be consolidated, treated as one, for sentencing purposes. Consolidation should not occur by accident through the happenstance of the schedul-ing of a court hearing or the kind of papers filed in the case or the administrative handling of the case."

In this case, although there were "many characteristics of a consolidated sentencing," the district court "did not err in treating the two separate indictments as 'unrelated.'" The appellate court found that "there was no showing that there was

a request in the plea agreement that the cases be consolidated for sentencing purposes. The cases were continually treated as separate except for the various court proceedings being held at the same time before the same judge. . . . There is nothing in the record to indicate that the district court considered or made a determination that the cases were so related that they should be consolidated for sentencing purposes because one overall sentence would be appropriate for the three crimes, or that, except for the concurrent provision, the sentence for one conviction was somehow affected by the conduct under the other charge. At each hearing the two indictments were treated as separate cases, and there is nothing to show that the sentence for any charge would have been different if the cases had been heard on different days before different judges at entirely separate sentencing hearings."

U.S. v. Russell, 2 F.3d 200 (7th Cir. 1993).

See *Outline* at IV.A.1.c.

Career Offender Provision

U.S. v. Hayes, No. 91-30432 (9th Cir. Oct. 8, 1993) (Order amending original opinion at 994 F.2d 714, to remove holding that the offense of felon in possession of a sawed-off shotgun is a crime of violence: "Because we hold that possession of an unregistered sawed-off shotgun is a crime of violence, we need not decide whether being a felon in possession of a sawed-off shotgun is a crime of violence." Defendant's status as career offender is reaffirmed.).

Note to readers: This affects the entries for *Hayes* in 5 *GSU* #14 and *Outline* at IV.B.1.b.

General Application Principles

Relevant Conduct

U.S. v. Carrozza, No. 92-1798 (1st Cir. Sept. 16, 1993) (Campbell, Sr. J.) (Remanded: In sentencing RICO defendant, district court erred in "conclud[ing] that relevant conduct in a RICO case was, as a matter of law, limited to the specific predicate acts charged against the defendant . . . and conduct relating to the charged predicates. . . . We hold that relevant conduct in a RICO case includes all conduct reasonably foreseeable to the particular defendant in furtherance of the RICO enterprise to which he belongs." Also, "the term 'underlying racketeering activity' in § 2E1.1(a)(2) means simply any act, whether or not charged against the defendant personally, that qualifies as a RICO predicate act under 18 U.S.C. § 1961(1) and is otherwise relevant conduct under § 1B1.3." However, the statutory maximum sentence, which for RICO can be increased depending on the seriousness of the underlying racketeering activity, "must be determined by the conduct alleged within the four corners of the indictment," and uncharged relevant conduct affects only where defendant is sentenced within the statutory range.).

See *Outline* generally at I.A.4.

Departures

Mitigating Circumstances

U.S. v. Benish, No. 92-3311 (3d Cir. Sept. 16, 1993) (Sloviter, C.J.) (Affirmed: "The exclusive focus [in § 2D1.1] on the number of marijuana plants leads us to conclude that the Commission considered and rejected any other factors. Thus, we see no basis on which a district court could conclude that the age or sex of particular marijuana plants are factors that have not 'adequately' been considered by the Commission. . . . We see nothing atypical or unusual in the fact that the particular plants here were male, old, and possibly weak."). *Cf. U.S. v. Upthegrove,* 974 F.2d 55, 56 (7th Cir. 1992) (poor quality of marijuana is not ground for downward departure).

See *Outline* at II.B.2 and VI.C.4.b.

U.S. v. Hadaway, 998 F.2d 917 (11th Cir. 1993) (Remanded: Defendant, who pled guilty to possession of an unregistered sawed-off shotgun, claimed the district court erred by refusing to consider a downward departure on the grounds that his conduct was "outside the heartland" of such cases, did not cause the harm the law was intended to prevent (he averred that he acquired the gun on a whim, meant to keep it as a curiosity or for parts, and did not even know if it worked), and the rural community in which he lives considers the sentence to be excessive. The appellate court remanded because "it is clear that the district court had the authority to depart downward if it were persuaded that Hadaway's case truly was 'atypical . . . where conduct significantly differs from the norm,' U.S.S.G. Ch. 1, Pt. A, n.4(b), or that Hadaway's conduct threatened lesser harms, U.S.S.G. § 5K2.11," p.s. However, departure cannot be based on the community's view of the crime: "[W]e join the First and Fifth Circuits in holding that departures based on 'community standards' are not permitted." *See U.S. v. Barbontin,* 907 F.2d 1494 (5th Cir. 1990) (rejecting upward departure for community standards); *U.S. v. Aguilar-Pena,* 887 F.2d 347 (1st Cir. 1989) (same).).

See *Outline* at VI.B.2 and VI.C.4.b.

Probation and Supervised Release

Revocation of Supervised Release

U.S. v. Levi, 2 F.3d 842 (8th Cir. 1993) (Affirmed: Ex Post Facto Clause is not violated by application of amended revocation policy statements, § 7B1 (Nov. 1990), to defendant who committed the underlying offense before the amendments but violated his supervised release afterwards: "This court has found that the sentencing court is required only to 'consider' Chapter 7 policy statements. . . . Being merely ad-visory, a Chapter 7 policy statement is not a law within the meaning of the Ex Post Facto Clause. . . . Consequently, the fact that the district court considered a Chapter 7 policy state-ment that had been amended subsequent to Levi's initial sentencing does not implicate the Ex Post Facto Clause."). *See also U.S. v. Schram,* No. 92-30023 (9th Cir. July 22, 1993) (Farris, J.) (Affirmed: District court correctly applied Nov. 1990 version of § 7B1 even though defendant's underlying offense occurred before then: "Sections 7B1.3 and 7B1.4 were amended before Schram violated the terms of his supervised release. They were not applied 'retroactively' because they were not applied to conduct completed prior to their enactment."). *Cf. U.S. v. Bermudez,* 974 F.2d 12, 13–14 (2d Cir. 1992) (per curiam) (consider Chapter 7 policy statements after revocation of supervised release even though defendant was originally sentenced before effective date of Guidelines).

See *Outline* generally at VII.

Certiorari Granted:

U.S. v. Nichols, 979 F.2d 402 (6th Cir. 1992), *cert. granted,* No. 92-8556 (Sept. 28, 1993). Issue: Whether a prior uncounseled misdemeanor conviction can be used in calculating defendant's criminal history score.

See *Outline* at IV.A.5.